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The promises and perils of asserting the mediation privilege

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Mediation appears to offer a number of benefits including the ability of participants to disclose confidential information during mediation with the assurance that such information will be protected by the mediation privilege. The mediation privilege purports to offer strong protection for communications that occur during the course of mediation. Attorneys, nonetheless, must be careful to avoid any number of pitfalls when asserting the mediation privilege.

The Illinois Mediation Act (the "Act") provides that statements which occur "during a mediation" or "for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation" are "privileged" and "not subject to discovery or admissible in evidence." 710 ILCS 35/2(2), 710 ILCS 35/4(a), *Royce v. Michael R. Needle, P.C.*, 2015 U.S. Dist. LEXIS 113265, *22 (N.D. Ill. 2015). The mediation privilege is not limited to proceedings that are directly related to the underlying controversy that is the subject of the mediation. *Royce*, 2015 U.S. Dist. LEXIS, at *23. It also extends to oral understandings that have been reached during the course of mediation discussions. *Id.* at *24. However, there are a number of exceptions that attorneys must be aware of when relying upon the mediation privilege.

A party can waive the privilege, for example, by making a representation about a mediation communication that prejudices another or by intentionally using the mediation to plan or attempt to commit a crime. 710 ILCS 35/5(b)-(c). Also, there is no privilege for a number of mediation communications, including, a communication that is "an agreement evidenced by a record signed by all parties to the agreement" or "available to the public under the Freedom of Information Act" or "a threat or statement of plan to inflict bodily injury or commit a crime of violence," or that is "sought or offered to prove or disprove a claim or complaint of professional misconduct. . . filed against a mediator", or that is "sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation." 710 ILCS 35/6(a).

Some district courts have recognized a federal common-law mediation privilege under Federal Rule of Evidence 501. See *e.g.*, *Sheldone v. Pennsylvania Turnpike Comm'n*, [104 F. Supp. 2d 511](#), 517 (W.D. Penn. 2000), *Folb v. Motion Picture Industry Pension & Health Plans*, [16 F. Supp. 2d 1164](#), 1180 (C.D. Cal. 1998). Such a privilege is similar to the privilege recognized under the Illinois Mediation Act, but can vary from court to court. For example, the court in *Sheldone* defined the contours of the mediation privilege as comporting with a local rule regarding standards for the appropriate scope of confidentiality in the mediation privilege. 104 F. Supp. at 517. In doing so, the court found, among other things, that the privilege protected from disclosure "all written and oral communications made in connection with or during' a mediation conducted before a 'neutral' mediator" and that no such communications "may be 'used for any purpose (including impeachment) in a civil action or in any other proceedings.'" *Id.* Neither the 7th Circuit nor the Northern District of Illinois has recognized a federal mediation privilege. See *Craftwood Lumber Co. v. Interline Brands*, 2014 U.S. Dist. LEXIS 48830, *11 (N. D. Ill. 2014) (noting that "[t]he Seventh Circuit has not recognized a federal mediation privilege, nor has any Northern District of Illinois court" and that the plaintiff had "not presented [the court] with any persuasive authority" to recognize such a privilege). Thus, attorneys practicing in federal court must carefully consider whether the Illinois mediation privilege will apply to their case or not.

Attorneys also need to be careful in determining when the Illinois mediation privilege applies in the first place. Although the Illinois Mediation Act was adopted in 2004, there has been little Illinois case law developed on this point. As such, practitioners must be careful to limit their reliance upon the privilege to communications that clearly fall within the parameters of the Act. For instance, communications that occur immediately after the mediation may not be protected by the mediation privilege even when the communications include information learned during the mediation. See *Acquis, LLC v. EMP Corp.*, 2017 U.S. Dist. LEXIS 100856, *5 (D. Mass. 2017) (finding that under the federal common law mediation privilege such communications were not protected).

Finally, and perhaps the most important point to be considered, even though the disclosure of information may be privileged, the reality of the information disclosed may nonetheless become a factor in resolution of the dispute, particularly if the mediation effort is unsuccessful. Opposing counsel will not forget what has been communicated during mediation and may seek to obtain the same information through the discovery process.

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